Sanjeev Kumar a/l Veerasingam v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-09–153–05 OF 2013, W-09–155–05 OF 2013 AND W-06B-33–05 OF 2013

RAUS SHARIF PCA, MOHD YUNUS AND MOHTARUDIN BAKI JJCA

30 JANUARY 2015

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appeal against decision of High Court in affirming decision of sessions court — Accused persons charged as principle offender and for abetting — Entry of death in Hospital — Offence of forging and falsifying documents for the purpose of cheating — Whether convictions and sentences safe — Penal Code ss 415 & 468

These are appeals against the decision of the High Court dismissing the appeals of the three appellants against their convictions and sentences by the sessions court on charges of forgery for the purpose of cheating, cheating and abetment. Before the sessions court, the third appellant was accused and tried as the principle offender for the offences of forgery for the purpose of cheating and the offence of cheating. The first and second appellants were charged for offences of abetment. All three appellants were jointly tried before the sessions court. The evidence established by the prosecution was that a 30-year old HIV positive patient at the Kuala Lumpur Hospital died at the emergency ward of 'cardiac tamponade'. In accordance with hospital procedure, his body was transferred to the mortuary of the hospital at the Forensic Department. The third appellant, Subramaniam, was charged before the sessions court for four offences, namely, the offence of forgery for the purpose of cheating in relation to falsifying an entry relating to the death of a person in the Register of Deaths of the Kuala Lumpur Hospital, an offence under s 468 of the Penal Code; the offence of cheating one Dr Wan in relation to the issuance of a false death certificate, an offence under s 415 of the Penal Code. He was found guilty of all the four charges and sentenced accordingly by the sessions court. He appealed to the High Court against both convictions and sentences but the appeal was dismissed. Hence, the present appeal.

Held, allowing the appeals of the first and second appellants; setting aside the convictions and sentences:

(1) The sessions court judge erred in calling the third appellant to enter his defence on the charges under s 468 of the Penal Code. He should have found a prima facie case established only for the offences of forgery simpliciter. The third appellant should have been called to enter his

defence only on offences pertaining to forgery simpliciter. From the evidence, it had not been established that the third appellant had intended the document forged be used for the purpose of cheating (see paras 30, 35 & 38).

(2) The third appellant was not a credible witness and his evidence had not cast a reasonable doubt against the prosecution case, even assuming the charges against him to be that of forgery simpliciter. The High Court judge should have exercised his powers conferred under s 316 of the Criminal Procedure Code and ought to have altered the finding of the sessions court judge and to substitute a conviction under s 465 for the offence of forgery simpliciter of the Penal Code in respect of the three charges (see paras 51–52).

(3) The court partially allowed the appeal of the third appellant in respect of the first, second and third charges. The convictions and sentences that were recorded or passed by the sessions court judge based on s 468 of the Penal Code and affirmed by the High Court, was set aside. Instead, for each of the three charges, the court substituted a conviction for the offence of forgery simpliciter under s 465 of the Penal Code and a sentence of imprisonment of one year, and a fine of RM5,000, in default six months imprisonment (see para 53).

(4) The charges did not specify in what manner the acts of abetment were done by the first and second appellants. All that was stated in each of the four charges to describe the acts of abetment were only the words 'telah bersubahat'. Thus the charges were very vague, and were materially and substantially defective and the manner they were drafted contravened s 154 of the Criminal Procedure Code. On this ground alone the appeals of the first and second appellants ought to be allowed. The alleged acts of abetment were said to be on the 13 September 2003 at the Kuala Lumpur Hospital's mortuary, yet, remarkably, there was no evidence that the first and second appellants were at the mortuary on 13 September 2003 and meeting the third appellant there, let alone the doing of any act of abetment at the mortuary (see para 59).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi yang menolak rayuan ketiga-tiga perayu terhadap sabitan dan hukuman mereka oleh mahkamah sesyen atas pertuduhan pemalsuan bagi tujuan menipu, menipu dan bersubahat. Di mahkamah sesyen, perayu ketiga dituduh dan dibicarakan sebagai pesalah utama untuk pemalsuan bagi tujuan menipu dan kesalahan menipu. Perayu pertama dan kedua dituduh untuk kesalahan bersubahat. Ketiga-tiga perayu dibicarakan bersama di mahkamah sesyen. Keterangan yang dibuktikan oleh pendakwa raya adalah bahawa seorang pesakit HIV positif berusia 30 tahun di Hospital Kuala Lumpur meninggal di wad kecemasan

disebabkan oleh 'cardiac tamponade'. Menurut prosedur hospital, badannya akan dipindahkan ke bilik mayat hospital di Jabatan Forensik. Perayu ketiga, Subramaniam, dituduh di mahkamah sesyen untuk empat kesalahan, iaitu, kesalahan pemalsuan bagi tujuan menipu berhubung memalsukan satu catatan berhubung kematian seseorang di dalam Daftar Kematian di Hospital Kuala Lumpur, satu kesalahan di bawah s 468 Kanun Keseksaan; kesalahan menipu Dr Wan berhubung pengeluaran sijil kematian palsu, satu kesalahan di bawah s 415 Kanun Keseksaan. Dia didapati bersalah atas keempat-empat pertuduhan dan dijatuhi hukum sewajarnya oleh mahkamah sesyen. Dia merayu kepada Mahkamah Tinggi terhadap sabitan dan hukuman tetapi rayuan tersebut ditolak. Oleh itu, rayuan ini dibuat.

Diputuskan, membenarkan rayuan perayu pertama dan kedua; mengetepikan sabitan dan hukuman:

(1) Hakim mahkamah sesyen terkhilaf dalam memanggil perayu ketiga untuk memasukkan pembelaannya ke atas pertuduhan di bawah s 468 Kanun Keseksaan. Dia sepatutnya membuat dapatan satu kes prima facie terbukti hanya untuk kesalahan pemalsuan simpliciter. Perayu ketiga seharusnya dipanggil untuk memasukkan pembelaannya hanya ke atas kesalahan berkenaan pemalsuan simpliciter. Daripada keterangan, tidak dibuktikan bahawa perayu ketiga berniat menggunakan dokumen yang dipalsukan untuk tujuan penipuan (lihat perenggan 30, 35 & 38).

(2) Perayu ketiga bukannya seorang saksi yang boleh dipercayai dan keterangannya tidak menimbulkan satu keraguan munasabah terhadap kes pendakwa raya, malah dengan mengandaikan pertuduhan terhadapnya merupakan pemalsuan simpliciter. Hakim Mahkamah Tinggi sepatutnya melaksanakan kuasa yang diberikan di bawah s 316 Kanun Prosedur Jenayah dan sepatutnya mengubah dapatan hakim mahkamah sesyen dan menggantikan sabitan di bawah s 465 untuk kesalahan pemalsuan simpliciter Kanun Keseksaan berhubung tiga pertuduhan (lihat perenggan 51–52).

(3) Mahkamah membenarkan sebahagian rayuan perayu ketiga berhubung pertuduhan pertama, kedua dan ketiga. Sabitan dan hukuman yang direkodkan atau diputuskan hakim mahkamah sesyen berdasarkan s 468 Kanun Keseksaan dan disahkan oleh Mahkamah Tinggi, telah diketepikan. Sebaliknya, untuk setiap tiga pertuduhan, mahkamah menggantikan satu sabitan untuk kesalahan pemalsuan simpliciter di bawah s 465 Kanun Keseksaan dan hukuman penjara satu tahun dan denda sebanyak RM5,000, sekiranya ingkar, enam tahun penjara (lihat perenggan 53).

(4) Pertuduhan tidak menyatakan dalam cara apa tindakan bersubahat dilakukan oleh perayu pertama dan kedua. Apa yang dinyatakan dalam setiap empat pertuduhan untuk menyatakan tindakan bersubahat

hanyalah perkataan 'telah bersubahat'. Oleh itu pertuduhan tersebut sangat kabur dan secara material dan asasnya cacat dan cara pertuduhan tersebut didraf bercanggah dengan s 154 Kanun Tatacara Jenayah. Atas alasan ini sahaja rayuan perayu pertama dan kedua seharusnya dibenarkan. Tindakan bersubahat didakwa berlaku pada 13 September 2003 di bilik mayat Hospital Kuala Lumpur, namun, anehnya tiada bukti bahawa perayu pertama dan kedua berada di bilik mayat pada 13 September 2003 dan menemui perayu ketiga di sana, apatah lagi melakukan sebarang tindakan bersubahat di bilik mayat tersebut (lihat perenggan 59).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Datuk Tiah Thee Kian v Public Prosecutor & Other Appeals [2002] 1 MLJ 585; [2002] 2 CLJ 21, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Criminal Procedure Code ss 154, 158(1), (2), 162, 316
Penal Code ss 34, 107, 415, 415(a), (b), 417, 463, 464, 464(b) 465, 467, 468, 471

Appeal from: Criminal Appeal Nos 42–103 of 2010 (High Court, Kuala Lumpur), Criminal Appeal No 42–104 of 2010 (High Court, Kuala Lumpur) and Criminal Appeal No 42A-105 of 2010

Sithambaram (Puvaneswaran a/l Mohanasundram with him) (Sitham & Assoc) for the first appellant.
Naran Singh (Naran Singh & Co) for the second and third appellants.
Nahrah Dollah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Yunus JCA (delivering judgment of the court):

[1] These are appeals against the decision of the High Court of Kuala Lumpur (Criminal Division) dismissing the appeals of the three appellants against their convictions and sentences by the Sessions Court of Kuala Lumpur on charges of forgery for the purpose of cheating, cheating and abetment.

[2] Before the trial court (that is, the sessions court), the third appellant, Subramaniam, was accused and tried as the principle offender for the offences of forgery for the purpose of cheating and the offence of cheating. The first

appellant, Sanjeev Kumar, and the second appellant, Kumaresan, were charged for offences of abetment.

[3] All three appellants were jointly tried before the sessions court.

THE APPEAL OF THE THIRD APPELLANT, SUBRAMANIAM

[4] As the third appellant, Subramaniam, was charged and tried as the principal offender, we are of the view that it is convenient that in this judgment we deal with his appeal first.

[5] The third appellant, Subramaniam, was charged before the sessions court for four offences, namely:

(a) *first charge* — the offence of forgery for the purpose of cheating in relation to falsifying an entry relating to the death of a person in the Register of Deaths of the Kuala Lumpur Hospital; an offence under s 468 of the Penal Code, and punishable under the same section;

(b) *second charge* — the offence of forgery for the purpose of cheating in relation to falsifying a burial permit number A310068 purportedly issued by the Kuala Lumpur Hospital; an offence under s 468 of the Penal Code, and punishable under the same section;

(c) *third charge* — the offence of forgery for the purpose of cheating in relation to falsifying a death certificate No C 836454 purportedly issued by the Kuala Lumpur Hospital; an offence under s 468 of the Penal Code and punishable under the same section; and

(d) *fourth charge* — the offence of cheating one Dr Wan Mohamad Zamri bin Wan Nawawi of the Kuala Lumpur Hospital in relation to the issuance of a false death certificate No C 836454; an offence under s 415 of the Penal Code and punishable under s 417 of the same.

[6] All four offences are alleged to have been committed on the same date, at the same time and place. The date is alleged to be 13 September 2003; the time is alleged to be between 11am and 3pm; and the place is alleged to be the mortuary of the Kuala Lumpur Hospital.

[7] He was found guilty of all the four charges and sentenced accordingly by the trial court (the sessions court).

[8] He appealed to the High Court against both convictions and sentences. But his appeal was dismissed.

[9] Hence his appeal before this court.

[10] We find it convenient to deal with the first three charges first. We shall deal with them together. The three charges are:

(a) *first charge* — the offence of forgery for the purpose of cheating in relation to falsifying an entry relating to the death of a person in the Register of Deaths of the Kuala Lumpur Hospital; an offence under s 468 of the Penal Code, and punishable under the same section;

(b) *second charge* — the offence of forgery for the purpose of cheating in relation to falsifying a burial permit No A310068 purportedly issued by the Kuala Lumpur Hospital; an offence under s 468 of the Penal Code, and punishable under the same section; and

(c) *third charge* — the offence of forgery for the purpose of cheating in relation to falsifying a death certificate No C 836454 purportedly issued by the Kuala Lumpur Hospital; an offence under s 468 of the Penal Code and punishable under the same section.

[11] The evidence established by the prosecution is that on 12 September 2003, at 2.15am, a 30 year old HIV positive patient at the Kuala Lumpur Hospital known only by the name 'Unknown Mohan' (he was merely known as such as he had no identification document with him) died at the emergency ward of 'cardiac tamponade'. In accordance with hospital procedure, his body was transferred to the mortuary of the hospital at the Forensic Department. A burial permit No A310068 (exh P5) was issued by the authorised doctor, namely, Dr Khoo Su King ('PW13'), and written in the burial permit (exh P5) is the name 'Unknown Mohan'. On the following day, that is, on 13 September 2003, the third appellant had dishonestly deleted the name 'Unknown Mohan' in the burial permit (exh P5) and in place of that name had written the name 'Michael a/l Soosai'; that the third appellant had dishonestly erased the name 'Unknown Mohan' in an entry (exhs P6A and P6B) in the Register of Deaths (exh P6) by means of a correction fluid and had written the name 'Michael a/l Soosai' instead; and had falsified a death certificate (exh P16) purportedly to be that of one 'Michael a/l Soosai', when that death certificate should have been in the name of 'Unknown Mohan'.

[12] To begin with, there is the evidence of a prosecution witness, Azhar bin Junus ('PW3'), a medical assistant at the Forensic Department of the Kuala Lumpur Hospital. PW3 said that he was on duty on 12 September 2003. While on duty, at around 3pm, he did receive a burial permit (exh P5) in respect of a dead patient known only as 'Unknown Mohan' from an attendant of Ward CRW of the Kuala Lumpur Hospital. He instructed an attendant of the Forensic Department to go over to Ward CRW to collect the body. The body of 'Unknown Mohan' arrived at the Forensic Department around 3.30pm. PW3 kept the body in a cabinet. Based on the information as recorded in the burial permit (exh P5), he recorded the particulars of the deceased

patient in the appropriate entry (exhs P6A and P6B) in the Register of Deaths (exh P6). He recorded the name of the deceased in the entry (exhs P6A and P6B) in the Register of Deaths (exh P6) as 'Unknown Mohan'; the registration number of the entry in question as 'RN 522078'; the age of the deceased as '33 years'; the time of death as '2.15 am'; and the date of death as '12 September 2003'. PW3 said that, at the time he received the burial permit (exh P5) from the attendant of Ward CRW, the name of the deceased patient on the burial permit (exh P5) was written as 'Unknown Mohan' and in the section for the 'Age' of the deceased patient it was recorded as '33'. There was no deletion of the name 'Unknown Mohan' then; and the name written in the burial permit (exh P5) was not 'Michael a/l Soosai'. In the 'Age' section of the permit, there was no deletion of the figure '33' and replaced by '44 years'.

[13] Before the trial court, during the examination-in-chief, PW3 was shown the entry in question (exhs P6A and P6B) in the Register of Deaths (exh P6). In that entry (exhs P6A and P6B) the name 'Unknown Mohan' was no longer in the 'Name' column; instead, what is now written in that column, in handwriting, is the name 'Michael a/l Soosai'. PW3 recognised the handwriting to be that of Subramaniam, the third appellant. According to PW3, the third appellant, was also a medical assistant at the Forensic Department; and was on duty at the material time. He had known the third appellant for four years as the latter had been his colleague at the Forensic Department four years; and as such he was familiar with the third appellant's handwriting. He testified that the handwritings for the particulars in the entry (exhs P6A and P6B) in the Register of Deaths (exh P6) in the columns for the 'Name', 'Age', 'Name of Next of Kin', 'Identity Card Number', and 'Relationship with the Deceased' were that of the third appellant.

[14] In examination-in-chief PW3 was also shown the burial permit (exh P5). He recognised the handwriting for 'Michael a/l Soosai' in the burial permit (exh P5) also to be that of the third appellant.

[15] According to PW3, the dead body was released from the mortuary at 2.50pm on 13 September 2003.

[16] Another material witness for the prosecution is Mat Zalan bin Ujang (PW4), a medical assistant at the Forensic Department of the Kuala Lumpur Hospital. He is also a supervisor at the Forensic Department and one of his duties is to maintain the duty roster of the medical assistants at the Forensic Department. He said in evidence that the third appellant was on duty at the Forensic Department on 13 September 2003 from 2pm–9pm.

[17] There is the evidence of Dr Wan Mohamad Zamri ('PW5'), a specialist in Medical Forensic at the Kuala Lumpur Hospital. He testified that on

13 September 2003 he did issue a 'death certificate' No C 836454 (exh P16) in respect of a deceased patient by the name 'Michael a/l Soosai'. He identified his signature in exh P16. In his evidence he said that at around 2pm on that day he was on duty at the Forensic Department and the third appellant came to see him. The third appellant's purpose of coming to see him (PW5) was to obtain his signature for the unsigned 'death certificate' (exh P16). The third appellant submitted to him four documents, namely:

(a) a burial permit (exh P5);

(b) an unsigned 'death certificate' (exh P16) bearing the name 'Michael a/l Soosai';

(c) an identity card bearing the name 'Michael a/l Soosai'; and

(d) an identity card bearing the name 'Kumaresan a/l Jayapalam'.

[18] According to PW5, the third appellant had typewritten the particulars in the unsigned 'death certificate' (exh P16), including the name 'Michael a/l Soosai'. PW5 said he signed the 'death certificate' (exh P16) after having satisfied himself that the particulars in the unsigned 'death certificate' are the same as the particulars in the appropriate entry (exhs P6A and P6B) in the Register of Deaths (exh P6) and in the burial permit (exh P5).

[19] There is the evidence of a nurse Jamizah bt Zuki ('PW10'). She testified that at the material time she was attached to Ward CRW, and she was present at the time when the patient 'Unknown Mohan' died in Ward CRW at 2.15am on 12 September 2003. She prepared and attached a body identification tag (exh P10) onto the body of the deceased patient known to her from the patient registration record only as 'Unknown Mohan'. Therefore, in the body identification tag (exh P10), she accordingly wrote the name 'Unknown Mohan'. She had the body sent to the mortuary at the Forensic Department. She further said that at around 2.20am she notified the polis of the death of the deceased as she did not have particulars of the deceased's next of kin. She testified that she saw Dr Khoo ('PW13') signed the burial permit (exh P5). She said that she could not recall seeing the name 'Michael' written in the permit and neither was there any deletion of the name in the burial permit (exh P5) at the time Dr Khoo (PW13) signed it. She said that in her ten years' experience at the CRW Ward, whenever there is a mistake made as to the name of the deceased in the burial permit, the practice was not to amend the permit but to issue a fresh permit.

[20] Another prosecution witness, Dr Khoo Su King (PW13), testified that he issued the burial permit (exh P5). He maintained that at the time he issued exh P5 there was no amendment to the name 'Unknown Mohan'. He said that in exh P5 it was he himself who had written the name 'Unknown Mohan'. He

also had written the age (of the deceased) as '33', the sex as 'male', and the race as 'Indian'. PW13 said that he had never authorised anyone to amend the burial permit (exh P5).

[21] There is the evidence of one Arjunan ('PW15') who worked with a funeral parlour, Selayang Casket, as a driver of a funeral van. In his evidence he said that on 13 September 2003, at around 11am, on the instruction of his employer, he did go to the Kuala Lumpur Hospital to collect a body from the mortuary to be taken to Cheras Crematorium for cremation. He said that at the Kuala Lumpur Hospital he did meet someone by the name of Kumaresan. He said Kumaresan took him to the mortuary of the hospital and showed him the body. The hospital's staff assisted him in putting the body into a coffin and carrying it to the funeral van. He added that for the purpose of the cremation, Kumaresan gave him a burial permit, exh P5. PW15, when cross-examined by learned counsel for the third appellant, was unable to identify any of the appellants as being the person whom he knew as 'Kumaresan'. In fact he said none of the appellants were present at the mortuary at the time when he was there to collect the body.

[22] PW15 in his evidence said that at the crematorium none of the next of kin of the deceased turned up although, on the instruction of his employer, he waited there for one hour waiting for the next of kin of the deceased to turn up.

[23] There is the evidence of Dr Abdul Halim Mansar ('PW6') who at the material time was the Head of the Forensic Department of the Kuala Lumpur Hospital. He testified that he had issued a written instruction (exh P19) dated 25 April 2001 prescribing the procedure to be followed in cases where the next of kin of a deceased patient wishes to claim the body of a patient who had died while in the care of the Hospital. According to the written instruction (exh P19) as laid down, in a case where the alleged identity of the deceased patient as claimed by the next of kin is different from the identity of the patient as stated in the hospital records, the body must not be released to the person claiming to be the next of kin of the deceased patient unless the person so claiming had lodged and produced a police report to confirm the identity of the dead patient. Once this has been done, the name of the deceased patient will be amended accordingly in the burial permit as well as in the entry in the Register of Deaths. But without such police report the hospital staff was not authorised to do any amendment to the name of the deceased patient either in the burial permit or in the entry in the Register of Deaths; or to release the body to the person claiming to be the next of kin.

[24] According to PW6, if there had to be a correction to the name in the entry in the Register of Deaths (exh P6), the correction ought to be done by deleting the name to be corrected with a line and writing the correct name

above the deleted name, followed by placing near the amendment the name and signature of the person doing the correction. The use of correction fluid to correct mistakes was not permitted.

[25] PW6 further said in evidence that it is the hospital's regulation that in cases of HIV patients the chop 'Biohazard' must be affixed to the appropriate entry in the Register of Deaths, and the body of the dead patient ought not to be released to the next of kin until a Health Inspector of Dewan Bandaraya Kuala Lumpur ('DBKL') had been notified of the death.

[26] A document examiner from the Chemistry Department, Wong Kong Yong ('PW1'), was called by the prosecution as an expert witness. PW1 had examined the burial permit (exh P5) and the relevant entry (exhs P6A and P6B) in the Register of Deaths (exh P6). He also examined samples of the third appellant's handwriting. His evidence proved that the handwritings 'Michael a/l Soosai' in the 'Name' column and the figure '44' in the 'Age' column, in the burial permit (exh P5), were that of the third appellant. His evidence further established that the handwritings 'Michael a/l Soosai' in the 'Name' column and the figure '40' in the 'Age' column in entry (exhs P6A and P6B) in the Register of Deaths (exh P6) also to be that of the third appellant. PW1 made further discovery in the entry in question (exhs P6A and P6B): there were correction fluids in the 'Name' and 'Age' columns used to obliterate the words 'Unknown Mohan' in the 'Name' column and the figure '32' in the 'Age' column.

[27] There is the evidence of a housewife, Pallipillamah ('PW23'). In her evidence she said that she knew a person by the name of Michael a/l Soosai since 2003 as her son had eloped with Michael Soosai's daughter and had subsequently married her. She alleged that the said Michael Soosai did make threats to kill her son as well as her husband. She testified that in 2004 a 'Cinema Movie' lucky draw result was sent to her house. According to the 'lucky draw result', she and her husband had 'won' a trip to India. She and her husband unsuspectingly accepted the lucky draw prize and went on the trip to India. Upon arrival at Chennai airport in India she and her husband were abducted by the persons who were there at the airport to meet them. They were transported in different cars. She was taken in a car by a couple, introduced to her as Thomas (the driver of the car) and Uma (a lady), to a town called Annamalai and there she was confined to a hotel. She did not know where her husband was taken to and by whom. However, according to PW23, on her third day in Annamalai, she saw Michael Soosai in front of the hotel where she stayed. At the time when she saw Michael Soosai, the latter was seated in a white car and was speaking to the lady Uma. She recalled that this was in December 2004. Upon seeing Michael Soosai, she immediately telephoned her daughter seeking her help to arrange for someone to rescue her from the hotel.

She subsequently was rescued; but later was notified by the Indian police that her husband had been murdered at a place in India known as Seyoor. She was certain that it was Michael a/l Soosai that she saw at the hotel in Annamalai.

[28] DSP Moktar bin Md Noor ('PW18') testified that he was a prosecuting officer at the Sessions Court, Petaling Jaya, on 2 July 2002. He was on that day conducting the prosecution against an accused person by the name 'Michael a/l Soosai' before sessions court judge, Wan Arfah, on thirteen charges under ss 467 and 471 of the Penal Code. Michael Soosai, however, was granted bail. His bailor was his wife, Kumari ('DW4'). Originally, the trial dates fixed for the case were 7–9 July 2003, but the trial was adjourned to 10–11 September 2003; and then adjourned again to 8–9 March 2004. But the trial did not proceed on 8–9 March 2004 as the court was informed by someone over the phone that the accused Michael a/l Soosai had 'died' on 12 September 2003. The court then fixed the case for mention on 23 October 2003. On 23 October 2003, a counsel, Karpal Singh, appeared in court on behalf of Michael Soosai to tender a 'death certificate' in respect of Michael Soosai and applied to the court for the charges to be withdrawn. PW18 told the court that he applied to the sessions court for an adjournment to seek instruction from the deputy public prosecutor. On the instruction of the DPP, at 2.45pm that very day (23 October 2003), PW18 formally withdrew the charges in open court on the ground that the accused, Michael Soosai, had 'died'. PW18 said that he tendered to the court the 'death certificate' of 'Michael a/l Soosai' (exh P16). The 'death certificate' (exh P126) was brought to the court by counsel Karpal Singh. On the basis of the 'death certificate' (exh P16), the court discharged the accused Michael a/l Soosai of the charges and released the bail deposit to the bailor.

[29] It is rather perplexing that the prosecution thought it fit not to call the counsel, Karpal Singh, to testify to explain as to the identity of the person who had given him the 'death certificate' (exh P16).

[30] On the basis of the above evidence, the trial court found that the prosecution had established a prima facie case against the third appellant, Subramaniam, for offences of forgery for the purpose of cheating under s 468 of the Penal Code. With respect, we are of the view that the trial court judge erred in calling the third appellant to enter his defence on the charges under s 468 of the Penal Code. He should have found a prima facie case established only for the offences of forgery *simpliciter*.

[31] Section 468 provides:

468 Forgery for the purpose of cheating.

Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

[32] What is forgery? Section 463 defines the offence of forgery. It states:

463 Forgery

Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

[33] One of the elements of forgery is the making of a false document. Section 464 defines what is meant by 'making a false document':

464 Making a false document.

A person is said to make a false document —

...

(b) who without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed by himself or by any other person, whether such person be living or dead at the time of such alteration;

[34] On the basis of the above provision of limb (b) of s 464, from the evidence it can be said that the third appellant had made false documents, namely, the burial permit (exh P5), the entry exhs P6A and P6B in the Register of Deaths (exh P6), and the 'death certificate' (exh P16). For he, without lawful authority, had altered two documents, namely, the burial permit (exh P5) and the entry (exhs P6A and P6B) in the Register of Deaths (exh P6); and that he had knowingly prepared a false 'death certificate' bearing a false particular, namely, the name 'Michael a/l Soosai' as the name of the deceased patient, and had submitted it to PW5 (Dr Wan Mohamed Zamri) 'with intent to commit fraud or that fraud may be committed', that is, to deceive PW5 into issuing the false death certificate (exh P16). Thus, prima facie, he had committed the offence of forgery.

[35] However, based on the definition of 'cheating' in the Penal Code, we are not satisfied from the evidence that it has been established that the third appellant had intended the document forged be used for the purpose of cheating.

[36] 'Cheating' is defined as follows:

415 Cheating.

Whoever by deceiving any person, whether or not such deception was the sole or main inducement —

(a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property; or

(b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property, is said to cheat.

[37] On the facts, obviously, limb (a) above does not apply. But as to limb (b), it is clear that the third appellant had deceived PW5 into signing the death certificate (exh P16) based on his alteration of the burial permit (exh P5) and the relevant entry (exhs P6A and P6B) of the Register of Deaths (exh P6). But it has not been established by the prosecution that the act of PW5 issuing the 'death certificate' (exh P16), purportedly in respect of 'Michael a/l Soosai', had resulted in the following requirement of limb (b) being satisfied: that the act of PW5 had caused or likely to cause damage or harm to the body, mind, reputation, or property of a person.

[38] Therefore, on the evidence, the third appellant should not have been called to enter his defence on the three charges under s 468 (that is to say, forgery for the purpose of cheating). For, in respect of these three charges, a prima facie case had been successfully established only in respect of the offences of forgery simpliciter under s 465 of the Penal Code (read with s 463 of the same). This means that the third appellant should have been called to enter his defence only on offences pertaining to forgery simpliciter under that section (s 465 of the Penal Code).

[39] Be that as it may, we shall now consider the evidence of the third appellant, Subramaniam, in his defence.

[40] Subramaniam in his defence admitted to deleting the name 'Unknown Mohan' in the burial permit (exh P5) and substituting the name 'Michael a/l Soosai'; and to erasing the name 'Unknown Mohan' in the 'Name' column in the entry (exhs P6A and P6B) in the Register of Deaths (exh P6) by using correction fluid and then substituting the name 'Michael a/l Soosai' in that column. He also admitted typing the particulars, including the name 'Michael a/l Soosai', in the unsigned 'death certificate' (exh P16) for the purpose of submission to PW5 (Dr Wan Mohamed Zamri). He further admitted submitting the burial permit (exh P5), the relevant entry (exhs P6A and P6B) in the Register of Deaths (exh P6), the unsigned death certificate (exh P16) to PW5 (Dr Wan Mohamed Zamri) together with the identity cards bearing the names 'Michael a/l Soosai' and 'Kumaresan a/l Jayapalam'. However, he

justified his actions by saying that the wife (DW4) of Michael a/l Soosai and one Kumaresan (the second appellant) had on the day in question came forward to claim the body; and had identified the body to be that of 'Michael a/l Soosai'. They had also produced the identity card of Michael a/l Soosai. He denied having done anything dishonest or irregular, or having done anything to deceive PW5 (Dr Wan Mohamed Zamri). He claimed that it was normal to make corrections in the Register of Deaths and burial permits by means of correction fluid.

[41] According to the third appellant, the next of kin did not produce any police report at the time of the release of the body, although he claimed to have advised them to do so.

[42] The third appellant admitted that, since the body was that of a HIV patient, in the entry at (exhs P6A and P6B) there had to be affixed the 'Biohazard' chop and that no 'Biohazard' body could be released to the next of kin without the Hospital first informing the Health Inspector of DBKL. According to the third appellant, at the time he released the body, the chop 'Biohazard' was not there in the entry (exhs P6A and P6B); and that he had no idea who had affixed the 'Biohazard' chop. In cross-examination, however, he was inconsistent and evasive when questioned as to why he did not inform the Health Inspector of DBKL before releasing the body to the 'next of kin'.

[43] In cross-examination, the third appellant admitted that he had knowledge of the departmental's instruction (exh P19) that the next of kin had to produce a police report as to the identity of the dead patient whose body is claimed before the body could be released to the next of kin; and that he had breached that written instruction. He was not able to give a clear answer when asked as to why he had breached the instruction.

[44] In cross-examination the third appellant denied that the correct procedure in amending the name in the entry (exhs P6A and P6B) in the Register of Deaths (exh P6) is not by means of correction fluid but by means of a deletion. He maintained that the practice in the Forensic Department was to use correction fluid. However, when asked as to why for the burial permit (exh P5) it was amended by means of a deletion and not by the use of correction fluid, the third appellant was not able to give a satisfactory answer.

[45] The third appellant called the wife of Michael a/l Soosai, one Kumari, (DW4) as his witness. Kumari testified that her husband, Michael a/l Soosai, whilst alive suffered a heart disease; that she came to know about her husband's 'death' at around 4–4.30pm on 12 September 2003 through the second appellant, Kumaresan, who was a relative of hers; and that she and Kumaresan went to the Kuala Lumpur Hospital's mortuary on 13 September to identify

and to claim the body of her 'husband'; and that at the hospital mortuary the necessary documentation procedure was attended to by Kumaresan.

[46] She further said in evidence that she had arranged for a funeral parlour, Selayang Casket, to arrange for her 'husband's' funeral. She said in evidence she had requested the funeral parlour to have her 'husband' cremated and that she was present when her 'husband' was cremated.

[47] When cross-examined, DW4 was not able to say for how long her 'husband' was hospitalised. The excuse she gave was that three weeks before her 'husband' died the latter did not come home as she and her 'husband' had a marital problem, the marital problem being that her 'husband' had an affair with another woman and was heavy on drinks. She was not able to explain the procedure involved at the hospital mortuary in claiming her husband's 'body'. She said everything was done by the second appellant, Kumaresan, and Selayang Casket.

[48] When cross-examined as to how she was related to Kumaresan, she answered that Kumaresan was a 'distant relative'. When pressed further to explain what she meant by that, she said Kumaresan was related to her in the sense that Kumaresan used to be engaged to her daughter but the couple had broken off.

[49] In cross-examination she conceded that in accordance with Hindu custom she had to bring her husband's 'body' home first before sending it to the crematorium for cremation, and that this was not done. She also said in cross-examination that she did not bring home her husband's ashes.

[50] The learned trial judge rejected the defence and convicted the third appellant of the three charges. However, in his grounds of judgment, the learned sessions court judge only considered the evidence of the third appellant and found him to be not a credible witness. The learned trial judge, however, failed to consider the evidence of DW4 (Kumari) at all. Be that as it may, we are of the opinion that this omission did not result in a miscarriage of justice as the evidence of the prosecution against the third appellant is overwhelming and that, in any event, from the notes of evidence we do not find DW4 to be a credible witness.

[51] In our judgment, we agree with the findings of the trial judge and the High Court judge that Subramaniam, the third appellant, is not a credible witness and that his evidence has not cast a reasonable doubt against the prosecution case, even assuming the charges against him to be that of forgery simpliciter.

[52] But on the basis of what we have said earlier, the learned High Court judge should have exercised his powers conferred under s 316 of the Criminal Procedure Code ('CPC') and ought to have altered the finding of the trial judge and to substitute a conviction under s 465 (the offence of forgery simpliciter) of the Penal Code in respect of the three charges.

[53] Under the circumstances, in the exercise of the powers of this court as conferred by s 60 of the Courts of Judicature Act 1964, we are allowing, but partially, the appeal of the third appellant, Subramaniam, in respect of the first, second and third charges. We set aside the convictions and sentences that were recorded or passed by the trial judge based on s 468 of the Penal Code (forgery with the intention to cheat) and affirmed by the High Court. Instead, for each of the three charges, we substitute a conviction for the offence of forgery simpliciter under s 465 of the Penal Code and a sentence of imprisonment of one year, and a fine of RM5,000 (in default six months imprisonment). We order the one year sentences for the three charges to run concurrently.

[54] We shall now deal with the fourth charge. It is the offence of cheating PW5 (Dr Wan Mohamed Zamri) under s 415 of the Penal Code, punishable under s 417 of the same. We are allowing this appeal against the conviction and sentence for this charge as the facts of the case does not establish the offence of cheating: neither the requirements of limb (a) nor the requirements of limb (b) of s 415 are satisfied by the facts of the case. In fact the charge is vague: it does not state which limb of s 415 is being invoked. As for limb (a) of s 415, on the evidence, the third appellant did not induce PW5 to part with any property. As for limb (b) of the same section, it has not been mentioned in the charge or established by the facts that PW5's act of issuing the 'death certificate' (exh P16) had caused any damage or harm to the body, mind, reputation or property of any person. Accordingly, the conviction and sentence in respect of the fourth charge are set aside.

[55] In this appeal, learned counsel for the third appellant advances two arguments. Firstly, it is submitted by learned counsel that each of the charges mentions 'seorang lagi yang masih bebas' and had made reference to s 34 of the Penal Code; yet the person alleged 'to be still at large' is not named in the charges. It is contended that such an omission had rendered the charges defective and had prejudiced the third appellant in his defence. The learned deputy public prosecutor, on the other hand, argued that the words 'seorang lagi yang masih bebas' in the charges are intended to refer to Michael a/l Soosai. On our part, we take the view that this omission to name the person 'at large' in the charges, whoever it is intended to be, is not fatal to the prosecution as no prejudice or miscarriage of justice had been occasioned. After all, the phrase 'seorang lagi yang masih bebas' is not an ingredient of the offence of forgery.

[56] Secondly, it is argued that the amendments made to the charges by the trial court to amend the date from '12 September' to '13 September', on the application of the prosecution under s 158(1) of the Criminal Procedure Code, at the stage of the proceedings where the trial court had ruled that the prosecution had established a prima facie case, is irregular and prejudicial to the defence. We find that this argument is devoid of any merits whatsoever, particularly, where upon examining the records we find that the trial court had complied with s 158(2) of the CPC in that the charges as amended were read and explained to the third appellant, and that pursuant to s 162 of the CPC the defence were given the right to recall any prosecution witness for further examination.

THE APPEAL OF THE FIRST AND SECOND APPELLANTS (SANJEEV KUMAR AND KUMARESAN)

[57] The first and second appellants (Sanjeev Kumar and Kumaresan), each of them, is charged for four offences: for abetting the third appellant (Subramaniam) in the commission of the offences mentioned in the four charges against the said third appellant. All four offences are alleged to have taken place at the same date, time and place. The date is alleged to be 13 September 2003; the time is alleged to be between 11am and 3pm; and the place is alleged to be at the mortuary of the Kuala Lumpur Hospital.

[58] Section 107 of the Penal Code prescribes the three ways in which a person can be said to have abetted the commission of an offence. The section provides:

> Abetment of a thing
>
> 107 A person abets the doing of a thing who —
>
> (a) instigates any person to do that thing;
>
> (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> (c) intentionally aids, by any act or illegal omission, the doing of that thing.

[59] We note with dismay, however, that the charges, unfortunately, do not specify in what manner the acts of abetment were done by the first and second appellants. All that is stated in each of the four charges to describe the acts of abetment are only the words 'telah bersubahat'. Thus the charges are very vague, and are materially and substantially defective (see *Datuk Tiah Thee Kian v Public Prosecutor & Other Appeals* [2002] 1 MLJ 585; [2002] 2 CLJ 21); and the manner they are drafted contravenes s 154 of the Criminal Procedure Code. On this ground alone the appeals of the first and second appellants ought to be allowed.

[60] We are, however, allowing the appeal on other grounds as well. Firstly, the third appellant, Subramaniam, the principal offender, as we have just ruled, is not guilty of the fourth charge (the offence of cheating, under s 415 read with s 417 of the Penal Code). Thus, it follows, that the first and second appellants cannot be found guilty of having abetted him in the commission of that offence.

[61] Secondly, there is nothing in the evidence to link the first and second appellants with the falsification by Subramaniam of the burial permit (exh P5) (the subject matter of the second charge against Subramaniam) and the relevant entry (exhs P6A and P6B) of the Register of Deaths (exh P6) (the subject matter of the first charge against Subramaniam).

[62] Thirdly, having critically examined the evidence we do not find that a case of abetment beyond reasonable doubt had been established in respect of the third charge against the first and second appellants (abetment in respect of the forgery of the 'death certificate', exh P16). In respect of the first appellant, Sanjeev Kumar, the prosecution was relying entirely on the evidence of one person, namely, one Dr Ravindran ('PW9') who at the material time was a doctor with the Kuala Lumpur Hospital at the Department of Urology. PW9 said he had arranged for meetings to be held between the first appellant and the third appellant at Clinic Leela Ratos where PW9 also worked as a locum. But PW9's evidence is rather general and vague in nature. It is, in our mind, unsafe to convict the first appellant by relying on the evidence of PW9 alone. Likewise the evidence against the second appellant in respect of the third charge against him is equally weak.

[63] In any event, bearing in mind that the alleged acts of abetment are said to be on the 13 of September 2003 at the Kuala Lumpur Hospital's mortuary, yet, remarkably, there is no evidence that the first and second appellants were at the mortuary on 13 September 2003 and meeting the third appellant there, let alone the doing of any act of abetment at the mortuary.

[64] Accordingly, we allow the appeals of the first and second appellants. Their convictions and sentences are set aside.

Appeals of first and second appellants allowed; setting aside convictions and sentences.

Reported by Afiq Mohamad Noor